

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JUNE 20, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 95-0617

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**IN THE INTEREST OF
JASON L. S., A PERSON
UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

JASON L. S.,

Respondent-Appellant.

APPEAL from an order of the circuit court for Marathon County:
MICHAEL W. HOOVER, Judge. *Affirmed.*

CANE, P.J. Jason L. S. (d.o.b. 7/26/78) appeals the juvenile court's nonfinal order waiving jurisdiction over him.¹ Jason raises four issues. He argues that the trial court erred by: (1) allowing the State to amend its waiver petition; (2) allowing the State to proceed on the amended petition because he

¹ Petition for leave to appeal was granted pursuant to mandate in *State ex rel. A. E. v. Green Lake County Circuit Court*, 94 Wis.2d 98, 105a, 292 N.W.2d 114, 114 (1980) (on reconsideration).

did not have sufficient notice under § 48.18(3)(a), STATS.; (3) considering the statement of another juvenile in the waiver hearing and that without that statement the waiver petition is insufficient and lacks prosecutive merit; and (4) waiving jurisdiction because the State failed to produce evidence of a clear and convincing nature. Because this court concludes that the trial court correctly interpreted and applied the law, the first three claims are rejected. Further, because this court concludes that the record contains sufficient evidence to support the trial court's decision, the fourth claim is also rejected. The order of the trial court is affirmed.

Jason is a juvenile with a record of previous delinquency. He had committed a sexual assault of a person under the age of sixteen in December of 1993. He was referred to children's court services on March 30, 1994, and placed into group counseling for juvenile sex offenders in May 1994. He was also undergoing concurrent private counseling for various personal problems, including controlling and properly venting anger. In June 1994, while still in counseling, Jason began planning to rob the McDonald's in the Wausau Center Mall.

On the evening of January 27, 1995, he and another juvenile (Kris K.) attempted to rob McDonald's. They used chewing gum to disable the lock on the back door of the restaurant to afford them entry after the restaurant closed. They clothed themselves in a manner to conceal their identities, including gloves and masks. When they were discovered by a restaurant employee, they battered him and used O.C. Spray² on him. Jason pointed a .357 Magnum look-alike pistol at the employee's head and threatened him. Jason then entered the restaurant and ordered the manager to open the safe. When the manager was unable to comply, Jason pointed his weapon at her, threatened her and then sprayed her with O.C. Spray. The two juveniles then fled from the mall on foot.

When Jason arrived at his home around 11:30 p.m., he acted in an unusual manner, prompting his parents to question him. After Jason admitted that he was the driver of the getaway car in a robbery, his parents called the Wausau Police Department to report their son's involvement in the robbery. The police went to Jason's home and spoke with his parents who gave the police

² Oleoresin of capsicum

several items that they had found, including a ski mask used in the robbery. He was then arrested for armed robbery. After receiving the parents' consent, the police searched the house and found several more pieces of evidence, including additional cans of O.C. Spray.

On January 28, 1995, Jason was charged with attempted robbery with the use of force, § 943.32(1)(a); burglary, § 943.10(1)(a); battery (concealing identity), § 940.19(1); and two counts of using oleoresin of capsicum/incapacitate, § 941.26(4)(a), STATS. The State filed the original petition to waive jurisdiction and its petition for the determination of delinquency status on January 30. The waiver hearing was scheduled for February 24 and notice of the waiver hearing was filed on February 3. On February 21, the State filed an amended petition for waiver and an amended petition for the determination of delinquency status. The waiver hearing was held and the order waiving jurisdiction was filed on February 24.

First, Jason argues that the trial court erred in allowing the State to proceed on its amended waiver petition as there is no express statutory provision allowing for amending such petitions. He argues that absent express authority to amend, amendments should be disallowed. He urges this court to adopt a very strict and technical reading of this statute.

Questions of statutory interpretation are questions of law which this court reviews de novo. *Town of Clearfield v. Cushman*, 150 Wis.2d 10, 19, 440 N.W.2d 777, 780 (1989). When engaging in statutory interpretation, the courts must strive to ascertain and give effect to the intent of the legislature. *State v. Pham*, 137 Wis.2d 31, 34, 403 N.W.2d 35, 36 (1987). When construing a statute, this court is to consider the entire section and related sections in constructing and interpreting its intent. *Pulsfus Farms v. Town of Leeds*, 149 Wis.2d 797, 804, 440 N.W.2d 329, 332 (1989).

The State concedes that there is no express authority to amend waiver petitions within ch. 48.18, STATS. However, such amendments are not expressly barred either. An examination of the chapter as a whole, and specifically § 48.01, STATS., reveals that the primary goal of the juvenile court is to protect the best interest of the child while simultaneously protecting the public. This purpose is "best served when the court has access to the fullest information possible." *In re S. N.*, 139 Wis.2d 270, 275, 407 N.W.2d 562, 564 (Ct.

App. 1987). Further, the legislature has stated that, "This chapter shall be liberally construed to effect the objectives contained in this section." Section 48.01(2), STATS.

An examination of the record reveals that the trial court correctly interpreted and applied the law. At the hearing, the court explained its decision and the logic behind it. It relied on a number of policy concerns including the juvenile's best interest, the public interest, the legislative intent and basic common sense. The court stated that any other decision would run "contrary to the scheme intended by the legislature." This court agrees that a strict reading of this chapter would not only be arbitrary and hypertechnical, but would run contrary to common sense and the intent of the legislature. This court agrees that amendments to waiver petitions are allowed.

Next, Jason argues that the court erred by allowing the State to proceed on the amended petition because he lacked sufficient notice under § 48.18(3)(a), STATS. He argues that because of this lack of notice, the trial court should not have considered the additional and new information in the amended petition.

Whether Jason received notice is a question of fact. Findings of fact will not be set aside unless clearly erroneous. Section 805.17(2), STATS. Section 48.18(3)(a), STATS., dictates that the State must provide "[w]ritten notice of the time, place, and purpose of the hearing ... at least 3 days prior to the hearing." These are the only factors that need to be considered when determining if notice exists.

An examination of the record reveals that there is sufficient evidence to support the trial court's determination that proper notice was given. Jason raises the issue of notice here but failed to show, or even claim, before the trial court that at least three days' notice was not given. The record shows that the amended petition was filed with the court and that a copy was delivered to Jason's attorney on February 21. The waiver hearing occurred on February 24. This meets the three-day statutory requirement. Further, both the original and the amended petition plainly state that the purpose of the hearing was to obtain an order waiving the juvenile court's jurisdiction. Additionally, it is documented in the record that notice of the time and location for the hearing

was given to Jason on February 3. The amended petition did not change this date.

This court also notes that Jason claims that he received insufficient notice of the new information within the amendment, yet demonstrates differently by his actions. The amended petition named three additional people as sources of new information. Jason demonstrated that he had sufficient notice of the amended petition and that he was not prejudiced by the amendment by calling the three newly named individuals to testify on *his own behalf and to rebut information alleged by the State*.

Next, Jason contends the trial court erred by considering Kris K.'s statement in the waiver hearing and that without that statement the waiver petition is insufficient and lacks prosecutive merit. He argues that under *Williamson v. United States*, 114 S. Ct. 2431 (1994), Kris K.'s statement is inadmissible. Jason reasons that the other juvenile made the statement simply to shift blame from himself to Jason. He urges that Kris K.'s statement is noninculpatory and should therefore be found unreliable by the court and not considered in the waiver hearing.

The question this court must address is whether Kris K.'s statement is unreliable as a matter of law. Therefore, this court must consider the issue without deference to the trial court's decision. See *Pham*, 137 Wis.2d at 34, 403 N.W.2d at 36.

Williamson is a leading case addressing this issue in which the Supreme Court attempted to clarify the hearsay exception for statements against penal interest. The Court recognized the continued validity and usefulness of such statements. *Id.* at 2434-35. "The fact that a statement is self-inculpatory does make it more reliable." *Id.* at 2435. However, a statement that is merely collateral to a self-inculpatory statement does not carry with it such a presumption of reliability. *Id.* "We see no reason why collateral statements, even ones that are neutral as to interest ... should be treated any differently from other hearsay statements that are generally excluded." *Id.*

After examining the record, this court cannot say that Kris K.'s statement is unreliable as a matter of law. Kris K. admits to helping Jason prepare for the robbery. He states that he and Jason carried O.C. Spray, that he

used the spray on an employee of McDonald's, that he chased and tackled the employee to stop him from getting help, and that he held the employee down so that Jason could go into the restaurant. Kris K.'s statement is clearly against his penal interest as it implicates both himself and Jason. This court does not view his statement as merely an attempt to shift blame. Kris K.'s statements admit to equal responsibility for the crimes and were not made collaterally. The same sections that inculcate Jason also inculcate Kris K. Thus, the statement is not unreliable as a matter of law.

Finally, Jason argues that the trial court erred by finding that the State had produced clear and convincing evidence that the juvenile should be waived into adult court. He argues that because some evidence at the hearing showed that he may be able to benefit in the juvenile system, that it was error for the court to waive him. We disagree.

Determining whether waiver is appropriate is within the discretion of the juvenile court. *In re J.A.L.*, 162 Wis.2d 940, 960, 471 N.W.2d 493, 501 (1991); *In re B.B.*, 166 Wis.2d 202, 207, 479 N.W.2d 205, 206 (Ct. App. 1991). This decision is to be guided by the criteria set forth in § 48.18(5), STATS. This court "will uphold a discretionary determination if the record reflects that the juvenile court exercised its discretion and there was a reasonable basis for its decision." *B.B.*, 166 Wis.2d at 207, 479 N.W.2d at 207.

The record supports the trial court's exercise of discretion. The trial court articulated evidence that weighed heavily against Jason. The trial court mentioned this evidence at length when giving its decision. Specifically, the court cited the following evidence: (1) Jason had a prior adjudication for sexual assault; (2) Jason's consumption of alcohol; (3) the acts inflicted emotional injury; (4) Jason's attitude;³ (5) Jason's motives and attitudes are more closely related to those of an adult; (6) the testimony that Jason was not a good candidate for change; (7) Jason had established an adult pattern of living; (8) Jason's failure to internalize previous treatment; (9) that the likely time requirements for successful rehabilitation were beyond what the juvenile

³ In his incident report narrative, officer Hagenbucher writes that in a discussion he had with Kris K., when asked if he realized what the consequences of his actions were, the juvenile responded, "Jason told him even if we get caught we would be tried as a juvenile and the most we could get is a year in secure." The trial court described this attitude on the part of Jason as one of "callous disregard for the law and for the legal process."

system could provide; and (10) the violent and aggressive nature of the offenses. This provides ample justification for the trial court's decision; therefore, we conclude that it properly exercised its discretion.

The true essence of Jason's argument is that he disagrees with the manner in which the court weighed the evidence presented to it. However, "the juvenile court has discretion as to the weight it affords each of the criteria under sec. 48.18(5) in deciding whether to waive jurisdiction." *J.A.L.*, 162 Wis.2d at 960, 471 N.W.2d at 501. Because we conclude that the trial court reasonably exercised its discretion, this court rejects Jason's arguments and affirms the order waiving juvenile court jurisdiction.

By the Court. – Order affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.